Government had the power to regulate—and, if need be, to ban—large amounts of political speech. Indeed, the amount of power Ms. Kagan and her office argued the Federal Government had in this area was so broad—so broad—that both liberal and conservative Justices found their arguments jarring, given the reverence Americans of all ideological stripes have for the first amendment. But that was, in fact, their argument.

During the first argument, the Court asked Ms. Kagan's deputy whether the government had the power to ban books if they were published by a corporation, and if the books urged the reader to support or defeat a candidate for office. Incredibly, he said, yes, the government could ban a corporation from publishing a book—even if it only mentioned the candidate once in 500 pages.

Not surprisingly, this contention prompted quite a bit of discussion among the Justices. They wanted to be clear that that is actually what Ms. Kagan's office was proposing. So, to remove any doubt about their position, Ms. Kagan's deputy said he wanted to make it, in his words, ''absolutely clear'' that the government did, in fact, have the power to ban certain speakers from publishing books that criticized candidates. Justice Souter asked if that meant labor unions, too. Ms. Kagan's deputy said that indeed it did.

Well, so troubled was the Court by the contention of the Solicitor General's office that the government had a constitutionally defensible ability to ban certain books by certain speakers, that it ordered another argument in the case. This time, Ms. Kagan herself appeared on behalf of the government. And this time, it was Justice Ginsburg who noted that at the first argument, Ms. Kagan's office argued that the Federal Government could, in fact, ban books, such as ''campaign biographies,'' despite the protections of the first amendment.

Justice Ginsburg asked whether that was still the government's position. Ms. Kagan responded that after seeing the reaction of the Supreme Court to her office's argument, they had rethought their position. Ms. Kagan maintained that while the Federal law in question did apply to materials like ''full-length books,'' someone probably would have a good first amendment challenge to it.

So far so good.

But her fall-back position was that the same law gives the government the power to ban pamphlets, regardless of the first amendment's protection for free speech. This caused the Justices to bristle again. One Justice asked where, in Ms. Kagan's world, does one ''draw the line''?

First, her office says it is OK for the government to ban books if it doesn't like the speaker; then it says it is OK to ban pamphlets if the government doesn't like the pamphleteer—a proposition that would come as a shock to the Founders, who disseminated quite a few pamphlets criticizing the government of their day.

Not surprisingly, Ms. Kagan lost the case—and in my view, it is good that she did.

Now, I asked Ms. Kagan about her position in this case last week when we met in my office. She said she made the arguments she did because she had to defend the statute. And I understand that her office has to defend Federal law. But the client doesn't choose the argument, the lawyer does. And the argument Ms. Kagan and her office chose was that the Federal Government has the power to ban books and pamphlets. That was the position of the Solicitor General and her office.

Not only was this argument troubling to those who cherish free speech, it likely contributed to the government's defeat. But my concerns about Ms. Kagan's position in this case extend farther than the arguments she and her office made, however troubling they are.

Shortly after she and I met, the press reported that she had cowritten a memo on campaign finance restrictions when she was in the Clinton administration. In it, she says that ''unfortunately'' the Constitution stands in the way of many restrictions on spending on political speech, and she believes that the Supreme Court's precedents establishing protections from the government in this area are ''mistaken in many cases.''

And just last Thursday, she told one of our colleagues that the Court was wrong in Citizens United because it should have deferred more to Congress. But deferred to Congress on what? Deferred to Congress on a statute that is so broad that it encompasses ''full length books'' and ''pamphlets,'' as Ms. Kagan put it, and probably to a host of other materials as well? One can only assume that since Ms. Kagan was making these comments in her individual capacity, they provide a more complete picture of her views about the government's ability to restrict political speech.

No politician likes to be criticized in books, pamphlets, movies, billboards, or anywhere else, Mr. President, whether it is a President or a Senator.

But there is a far more important principle at stake here than the convenience and comfort of public officials. And that principle is this: in our country, the power of government is not so broad that it can ban books, pamphlets, and movies just because it doesn't like the speaker and doesn't like the speech. No government should have that much deference.

The administration has nominated one of its own to a lifetime position on the country's highest court. We need to be convinced that Ms. Kagan is committed to the principle that the first amendment is not, as she put it, just some ''unfortunate,'' impediment to the government's power to regulate. It applies to groups for whom Ms. Kagan and the administration might not have empathy. And it applies to speech they might not like.

So as this process continues, I look forward to learning more about Ms. Kagan's record and beliefs in area.

I yield the floor.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, leadership time is reserved.

MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, there will now be a period for the transaction of morning business until 3 p.m., with Senators permitted to speak therein for up to 10 minutes each.

The Senator from Arizona.

NOMINATION OF ELENA KAGAN

Mr. KYL. Mr. President I, too, would like to address the Supreme Court nominee. I associate myself fully with the remarks of Senator MCCONNELL, which raise an important point for us to consider. I will correct the record in a couple of situations because I think, as the debate unfolds, it is important for us to base our decisions on the same set of facts. These are not going to be particularly newsmaking or big surprises, but I think the record should be corrected.

I know our majority leader, for example, misspoke the other day in commenting about Justice Sandra Day O'Connor because there is some similarity—she being the first woman ever appointed to the Supreme Court. I wanted to make sure the record reflected the actual situation with respect to Justice O'Connor.

Leader REID, I totally agreed with when he described her as ''one of my favorite Court Justices.'' He said it is ''not because she is a Republican but because she was a good judge.'' I subscribe to that as well.

He said:

> She had run for public office. She served in the legislature in Arizona. That is why she could identify with many problems created by us legislators, and she could work her way through that.

For the record, I wanted to indicate her experience on the bench as a judge, since it is not the case that she did not have prior judicial experience when nominated to the Supreme Court. She was actually appointed to the bench by our Democratic Governor at the time, Bruce Babbitt. She was on the court of appeals and on the superior court bench before that. She served on the Maricopa County Superior Court bench from 1975 to 1979, and in 1979 Governor Babbitt appointed her to serve on the Arizona Court of Appeals. So she had extensive experience, from 1975 through 1981, as a judge, including in an appellate capacity.